

Letter of Findings: 04-20110476
Gross Retail Tax
For the Years 2008 through 2009

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ISSUE

I. Public Transportation Exemption – Use Tax.

Authority: IC § 6-2.5-5-27; [45 IAC 2.2-5-61](#); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *General Motors Corp. v. Indiana Dep't of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Fell v. West*, 73 N.E. 719 (Ind. App. 1905).

Taxpayer argues that the Department erred in assessing tax on items Taxpayer purportedly uses in public transportation.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. Taxpayer's operations consist of transporting certain waste products on behalf of a steel mill. The steel mill contracts with a landfill for the disposal of certain waste products. The landfill owner enters into a contract with a broker for the handling of the waste products between the steel mill and the landfill. The broker enters into a contract with Taxpayer for the actual transport of the waste products.

The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer and determined that Taxpayer was not engaged in public transportation with regard to its operations. As a result, the Department issued a proposed use tax assessment. Taxpayer protested the assessment, the Department conducted an administrative hearing, and this Letter of Findings results.

I. Public Transportation Exemption – Use Tax.

DISCUSSION

Taxpayer claims that it is entitled to the public transportation exemption on its purchase of diesel fuel and repair parts for its vehicles. The exemption is found at IC § 6-2.5-5-27, which states:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

The rule is restated at [45 IAC 2.2-5-61](#), which states in relevant part:

(a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.

(b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

(c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property. (Emphasis added).

The Department's audit denied Taxpayer's claimed public transportation exemption based on Taxpayer's inability to provide a contract governing the transportation of waste products.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

IC § 6-2.5-5-27, like all tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). "The statutes of this state relating to the assessment and collection of taxes are liberally construed in favor of the taxing powers." *Fell v. West*, 73

N.E. 719, 722 (Ind. App. 1905).

Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." *General Motors Corp. v. Indiana Dep't of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct.1991).

The public transportation exemption is available for taxpayers who transport the property of other persons. The issue in this case is whether Taxpayer owns the waste generated and transported.

Taxpayer notes that, in general, transporting of residential and general business garbage does not qualify for the exemption provided under IC § 6-2.5-5-27. However, Taxpayer asserts that the contractual and regulatory requirements governing the waste transported by Taxpayer cannot permit ownership in that waste by anyone other than the customer.

In this particular case, Taxpayer has provided a copy of the standard contract between the landfill operator and the steel mill. Pursuant to the terms of the contract, "Title to any and all Waste handled or disposed of by [the customer] shall at all times remain with [the customer] and Broker (if a Broker is involved)." Furthermore, the contract provides the landfill operator has the right to inspect and reject any waste that was sent to the landfill prior to disposal at the landfill.

Further, Taxpayer cites to various regulations under [329 IAC 10](#) which provide for notification and inspection requirements related to the customer's waste. However, the specific regulations cited by Taxpayer—with one exception—were repealed in July 2004.

Even given the requirement that exemption statutes be narrowly construed against a taxpayer and in favor of taxation, this Taxpayer has met its burden of demonstrating that the waste it transports on behalf of its customers was in fact the customer's property. Therefore, Taxpayer has affirmatively established it transported its customer's property and the items assessed were used in public transportation.

FINDING

Taxpayer's protest is sustained.

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